FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-841

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,

Appellants,

v.

DOROTHY PENNINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

JURISDICTIONAL STATEMENT

Harold Schmittinger, Esquire
P. O. Box 427
Dover, Delaware 19901
Attorney for Appellants

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
QUESTIONS PRESENTED	4
STATEMENT OF CASE	5
THE FEDERAL QUESTIONS ARE SUBSTANTIAL	11
CONCLUSION	27
APPENDIX	1a
NOTICE OF APPEAL	2a
SUPREME COURT OF DELAWARE DECISION OF 8/31/79	5a
SUPERIOR COURT OF DELAWARE DECISION OF 8/1/78	24a
SUPERIOR COURT OF DELAWARE ORDER OF 8/22/78	34a
MOTION TO STRIKE OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT	37a

CITATIONS

Alexander v. General Accident Fire and Life Assurance Company, La. App., 98 So.2d 730 (1957)	20

Page

Antoniewicz v. Reszcynski,
Wisc. Supr., 236 N.W.2d 1 (1975) 23

Bailey v. Pennington,
Del. Supr., 1979 406 A.2d 644 14

Basso v. Miller,
N.Y. App., 386 N.Y.S.2d 564 (1976) 23

Brown v. Merlo,
Cal. Supr., 506 P.2d 212 (1973) 13, 26

Cates v. Beauregard Electric Cooperative, Inc.,
La. Sur., 328 So.2d 367 (1976) 23

Frederick v. Philadelphia Rapid Transit Company,
Pa. Supr., 10 A.2d 576 (1940) 20

Gallegher v. Davis,
Del. Super., 183 A. 620 (1936) 9, 14

Gibbes v. Zimmerman,
290 U.S. 326 (1933) 14

Justice v. Gatchell,
325 A.2d 99 11

Kermarec v. Compagnie Generale,
358 U.S. 625 (1959) 21, 25, 26

Mariorenzi v. Joseph diPonte, Inc.,
R.I. Supr., 333 A.2d 127 (1975) 23

Mile High Fence Company v. Radovich,
Colo. Supr., 489 P.2d 308 (1971) 23

Page

Mounsey v. Ellard,
Mass. Supr., 297 N.E.2d 43 (1973) 23

O'Leary v. Coenen,
N.D. Supr., 251 N.W.2d 746 (1977) 23

Ouellette v. Blanchard,
N.H. Supr., 364 A.2d 631 (1976) 23

Peterson v. Balach,
Minn. Supr., 199 N.W.2d 639 (1972) 23

Pickard v. City and County of Honolulu,
Hawaii Supr. 452 P.2d 445 (1969) 23

Preston v. Sleziak,
Mich. App., 167 N.W.2d 477 (1969) 20

Pritchard v. Norton,
106 U.S. 124 (1882) 14, 15

Reed v. Reed,
404 U.S. 71 (1971) 17

Rowland v. Christian,
Cal. Supr., 443 P.2d 561 (1968) 21, 22, 23, 25, 26

Sidle v. Majors,
536 F.2d 1156 (7th Cir. 1976)
cert. denied, 429 U.S. 945 (1976) 13, 26

Silver v. Silver,
280 U.S. 117 (1929) 24, 25, 26

Smith v. Arbaugh's Restaurant, Inc.,
469 F.2d 97 (D.C. Cir. 1972)
cert. denied, 412 U.S. 939 (1973) 22

	Page
Webb v. City and Burrough of Sitka, Ala. Supr., 561 P.2d 731 (1977)	22
U.S. Const. Amend. XIV	16, 17
28 U.S.C. §1257(2)	3
Del. Code Ch. 21, §6101(a)	9
Del. Code Ch. 25, §1501	1, 3, 4
59 Del. Laws Ch. 171 §1 (1973)	4
Restatement (Second) of Torts, §330, p. 172	19
62 Am. Jur. 2d, Premises Liability §99	19

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,

Appellants,

v.

DOROTHY PENNINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

JURISDICTIONAL STATEMENT

Buford Bailey and Karoline L. Bailey, his wife, Appellants, appeal from the final judgment of the Supreme Court of Delaware dated August 31, 1979, holding that 25 Del. C. §1501 is not uncon-

stitutionally violative of Appellants' rights under the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

OPINION BELOW

The opinion of the Supreme Court of the State of Delaware is reported at 406 A.2d 44 and is set forth in the Appendix hereto at p. 5a.

JURISDICTION

The Judgment of the Supreme Court of Delaware denying Appellant Buford Bailey the right to maintain a personal injury suit for damages against the Appellee on a common law theory of negligence on the grounds that 25 Del. C.

§1501 is an absolute bar to such an action against an occupier of land, was entered on August 31, 1979. See p. 5a, infra.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (2), this being an appeal which draws into question the validity of 25 Del. C. §1501 infra, page 4, on the grounds that it is repugnant to the due process clause and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Timely notice of appeal to this Court was filed in the Supreme Court of Delaware on November 27, 1979. See p. 2a, infra.

As the Supreme Court of Delaware explicitly rejected Appellants' Fourteenth Amendment challenge to 25 Del. C. §1501, this matter is appropriately brought to this Court by appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves 59 Del. Laws Ch. 171 §1 (1973) codified at 25 Del. C. §1501 which states:

> No person who enters onto the premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the willful or wanton disregard of the rights of others.

QUESTIONS PRESENTED

1. Whether 25 Del. C. §1501, which deprives a person injured by the negligent conduct of an owner or occupier of land of the right to bring a legal action to recover for injuries sustained while on that land, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.
2. Whether 25 Del C. §1501, which creates an irrational and arbitrary distinction between guests without payment and all other individuals except trespassers who may be injured by the owner or occupier of land on his premises, violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

Appellant Buford Bailey was injured while attending a party at the

home of the Appellee Dorothy Pennington, now Dorothy Whiteman. The Appellee invited about fifty friends, including Appellants Mr. and Mrs. Buford Bailey, to attend a corn roast at her home. Four oil-burning torches on poles inserted into the ground, used to repel insects, were placed around an outdoor dance floor. During the party, Appellee moved one of the torches and placed it approximately five feet from the picnic table occupied by the Appellants. Buford Bailey was seriously injured when that torch fell over, spilling burning oil. He brought a negligence action against Appellee for personal injuries; his wife Karoline L. Bailey brought a derivative action for loss of consortium.

(1) PROCEEDINGS IN THE TRIAL COURT

The action was commenced by the Appellants in the Superior Court of the State of Delaware on February 4, 1976. In an

Amended Answer filed August 20, 1976, the Appellee pled as a First Affirmative Defense the Delaware Premises Guest Statute 25 Del. C. §1501 as an absolute bar to Appellants' claim. Thereafter, Appellee filed a Motion for Summary Judgment and Appellants filed a Motion to Strike the First Affirmative Defense or in the Alternative for Summary Judgment on the grounds that the First Affirmative Defense was insufficient as a matter of law in that: 25 Del. C. §1501 violates both the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Appellants' Motion to Strike or in the Alternative for Summary Judgment challenging the constitutionality of 25 Del. C. §1501 is set forth in the Appendix hereto at p. 37a. The Motion was filed February 25, 1977 in the Trial Court and

raised for the first time the Federal Questions sought to be reviewed in this Appeal. After briefing and oral argument, the Trial Court upheld the constitutionality of 25 Del. C. §1501 and denied Appellants' Motion to Strike or in the Alternative for Summary Judgment and granted Appellee's Motion for Summary Judgment. The decision of the Trial Court is set forth in the Appendix hereto at p. 24a, and the specific holding of the Trial Court on the constitutional issues raised is found at p. 29a. Thereafter on August 22, 1978, the Trial Court entered an order expressly upholding the constitutionality of 25 Del. C. §1501 and denying Plaintiff's Motion to Strike or in the Alternative for Summary Judgment. See p. 34a.

(2) HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Appellants filed a timely Appeal from the order of August 22, 1978 (p. 34a)

to the Supreme Court of the State of Delaware wherein Appellants renewed their Federal Constitutional attack on the Delaware Premises Guest Statute, 25 Del. C. §1501.

Appellants argued that the Delaware Premises Guest Statute is an unconstitutional denial of due process under the Fourteenth Amendment, contending that the common law status classifications codified in 25 Del. C. §1501 deprived persons injured by the negligent conduct of another of the right to bring a legal action to recover for the injuries so sustained. The Supreme Court of Delaware denied this contention, holding that the due process attack was controlled by the Delaware Superior Court case of Gallegher v. Davis, Del. Super., 183 A. 620 (1936) which held that the Delaware Automobile Guest Statute 21 Del. C. §6101(a) was not violative of the remedy

for injury or due course of law clause of the Delaware Constitution, Article I, Section 9.

Appellants further contended that the Delaware Premises Guest Statute violates the equal protection clause of the Fourteenth Amendment because the distinctions drawn between guests without payment and all other individuals, except trespassers, who may be injured by the land occupier on his premises has no rational basis, and urged the Delaware Supreme Court to adopt a rule whereby an owner or occupier of land has a duty to exercise reasonable care to insure the safety of all persons reasonably anticipated to be present on the property. The Supreme Court of Delaware rejected this contention and held the Delaware Premises Guest Statute valid under the equal protection clause. The Court relied on its earlier decision in Justice v.

Gatchell, 325 A.2d 97 where it held the Delaware Automobile Guest Statute 21 Del. C. §6101 constitutional under a similar attack, stating that:

> We adhere to the rationale adopted and conclusions reached in Justice and apply them to the Delaware Premises Guest Statute. We remain convinced that the General Assembly, which created both of these Statutes, must undo whatever evils or unfairnesses have arisen under them in modern day circumstances. See p. 17a.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

As construed by Delaware's highest Court, 25 Del. C. §1501 bars an action by an injured guest without payment while on another's land unless such accident was intentional on the part of the owner or occupier of that land or was caused by his willful and wanton disregard of the rights of others. This derogation of the common law rule generally allowing

recovery for injuries incurred from the negligent conduct of another, guaranteed by the Federal Constitution, solely on the status of the injured party as a licensee, raises serious questions under both the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(a) 25 Del. C. §1501 violates Appellants' Fourteenth Amendment right to due process of law by totally prohibiting legal action to recover for injuries negligently inflicted upon them by another solely on the status of the injured party.

It has been held that for a Statute to be permissible under the due process clause of the Fourteenth Amendment, there must be a public or civic good achieved before a citizen is deprived of a property right through such Governmental exercise of power. In the case of Guest Statutes the public good to be advanced is

the protection of hospitality and avoidance of collusive lawsuits. See, e.g. Brown v. Merlo, Cal. Supr., 506 P.2d 212 (1973). However, in reality the major purpose of Guest Statutes is to protect insurance companies from having to pay claims and only secondarily do they protect individual hospitality. As is stated in Sidle v. Majors, 536 F.2d 1156 (7th Cir. 1976) cert. denied 429 U.S. 945 (1976).

> Guest Statutes were enacted during depression years to help the prevailing economic plight of the insurance companies that lobbied for their passage. No such justification presently exists. Counsel for Plaintiff has put it picturesquely: they are "an anachronistic monument to the insurance industry". Today virtually only insurance companies win protection under the Statute. Sidle v. Majors, supra, at 1159.

In denying Appellants due process attack on the Delaware Premises Guest

Statute, the Supreme Court of Delaware quoted from the early Delaware case of Gallegher v. Davis, supra, at 624 in stating:

> "No one has a vested interest in any rule of common law". Bailey v. Pennington, See p. 15a.

The rule expounded in Gallegher was misapplied as to the Delaware Premises Guest Statute. The legal effect of the Guest Statute bar on liability was to deny Appellants their right to redress.

> But, although a vested cause of action is property and is protected from arbitrary interference (Pritchard v. Norton, 100 U.S. 124, 132), the appellant has no property, in the constitutional sense, in any particularly form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). (emphasis supplied).

Since the application of the Premises Guest Statute in this case effectively denied Appellants all rights to recover for their injuries, the Delaware Supreme Court's holding in Gallegher and in the case at bar cannot be consistent with Gibbes.

Also, in an early United States Supreme Court case discussing a due process attack on a conflict of law statute limiting certain rights to sue on a contract, the Supreme Court stated:

> Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take away. Pritchard v. Norton, 106 U.S. 124, 132 (1882).

Under this case, the rule of Gallegher relied upon in the Delaware

Supreme Court's denial of Appellants due process argument may not accurately state the law. Taken together, Pritchard and Gibbes suggest that a State Statute which deprives a common law right of action can withstand due process attack only if there is some other form of remedy available to the injured party. Clearly, if the Delaware Premises Guest Statute is held constitutional, then there will be no alternative remedies available to Appellants, and so the effect of the Delaware Premises Guest Statute is to deprive Appellants of their right to bring legal action to recover for their injuries in violation of the due process clause of the Fourteenth Amendment.

(b) The Delaware Premises Guest Statute, 25 Del. C. §1501 denies Appellants' constitutional right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United

States Constitution, by creating an arbitrary distinction between persons in Appellants' class of guests without payment and all other individuals except trespassers.

The equal protection clause of the Fourteenth Amendment commands that distinctions drawn by a State - whether in the exactions of pains or in the allowance of benefits - must not be irrelevent, arbitrary, or invidious. Where a State chooses to limit benefits or remedies to one class and not to others [a] classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. So that all persons similarly circumstanced shall be treated alike." [citations omitted]. Reed v. Reed, 404 U.S. 71, 76 (1971).

The lesson of this Court's decisions construing the equal protection clause is that there can be no difference in treatment among citizens unless there is a rational distinction between the classes effected. Or, to put it another way, where no rational distinction exists between two persons or classes, the law must treat them alike. By these standards, 25 Del. C. §1501, is patently invidious, irrational, hence unconstitutional legislation. For purposes of the relevant constitutional requirement of equal protection under the laws, the label licensee or guest without payment rather than invitee or business visitor cannot reasonably dictate the remedies available to a party injured through the negligence of a land holder.

There is extensive authority to the effect that the common law premises liability distinctions codified by the

Delaware Premises Guest Statute are violative of the equal protection clause of the Fourteenth Amendment. The Restatement (Second) of Torts §330, p. 172 states that "[a] licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent". Included within this definition of licensees are social guests. Normally a social guest would not be a business invitee as that term is used for common law classification. By the same token, a social guest is not a trespasser either since he is on the property with the possessor's consent and often at the possessor's expressed invitation. With few exceptions the rule in the United States is that a social guest is considered a licensee, 62 Am. Jur. 2d. Premises Liability §99 p. 362. At least two jurisdictions have, nonetheless, classified social guests as invitees. See

Alexander v. General Accident Fire And Life Assurance Company, La. App. 98 So. 2d 730 (1957); and Preston v. Sleziak, Mich. App. 167 N.W. 2d 477 (1969). Traditionally, the duty owed to trespassers on land was to refrain from willful or wanton negligence. See e.g., Frederick v. Philadelphia Rapid Transit Company, Pa. Supr. 10 A.2d 576 (1940). 25 Del. C. §1501 follows the same rule as to licensees or guests without payment, that is, the duty owed to such individuals on another's land is for the land owner or occupier only to refrain from injuring them by willful, wanton, reckless or intentional conduct.

There has been a trend in State Courts as well as the United States Supreme Court to eliminate the common law distinctions which have led to unequal treatment under the laws, particularly as to guests without payment. This trend was

recognized in the United States Supreme Court case of Kermarec v. Compagnie Generale, 358 U.S. 625 (1959) in which this Court eliminated the invitee/licensee distinction in admiralty law. The Court, per Mr. Justice Stewart, described the trend of the State Court decisions leading up to Kermarec:

> Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances." Kermarec, supra, at 631.

Two State Supreme Court cases taken together with Kermarec lead to the inescapable conclusion that the Delaware Premises Guest Statute is violative of the equal protection clause of the United States Constitution. In Rowland v. Christian, Cal. Supr. 443 P.2d 561 (1968), the Supreme Court of California held that

the proper test to be applied to the liability of a possessor of land is whether in the management of his property he acted as a reasonable man in view of the probability of injury to others and Plaintiffs status as trespasser, licensee, or invitee, should not be determinative. The California Court stated that:

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Rowland v. Christian, supra, at 568.

Several jurisdictions have followed the lead of California in abandoning the common law status classifications. See Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) cert. denied 412 U.S. 939 (1973); Webb v. City and Burrough of Sitka, Ala. Supr. 561 P.2d 731 (1977);

Mile High Fence Company v. Radovich, Colo. Supr. 489 P.2d 308 (1971), Pickard v. City and County of Honolulu, Hawaii Supr. 452 P.2d 445 (1969); Cates v. Beauregard Electric Cooperative, Inc., La. Supr., 328 So.2d 367 (1976); Ouelette v. Blanchard, N.H. Supr., 364 A.2d 631 (1976); Basso v. Miller, N.Y. App., 386 N.Y.S.2d 564 (1976); and Mariorenzi v. Joseph diPonte, Inc., R.I. Supr., 333 A.2d 127 (1975). Although not completely following the lead of the above Courts, at least four other jurisdictions have abolished the distinction between licensees and invitees in favor of the general negligence standard while at the same time preserving the common law status of trespassers. See Mounsey v. Ellard, Mass. Supr., 297 N.E.2d 43 (1973); Peterson v. Balach, Minn. Supr., 199 N.W.2d 639 (1972); O'Leary v. Coenen, N.D. Supr., 251 N.W.2d 746 (1977); and Antoniewicz v. Reszcynski, Wisc. Supr., 236 N.W.2d 1 (1975).

Not only is it clear from Rowland and its progeny that the classification of a person on the land of another should not be determinative of the owner or occupier's liability, but also there is a strong trend in State Courts to recognize that the classification scheme which Guest Statutes create does not bear a substantial and rational relation to the Statute's purpose of protecting the hospitality of hosts and preventing collusive lawsuits and thus is violative of the equal protection guarantee in the Fourteenth Amendment. Although in an early United States Supreme Court case, an Automobile Guest Statute prevailed against an equal protection attack, Silver v. Silver, 280 U.S. 117 (1929), most of the modern State Court decisions have distinguished that decision. It should be recognized that all decisions have involved Automobile Guest Statutes rather

the Delaware Premises Guest Statute and thus do not contain the extra measure of support of the Rowland and Kermarec line of cases. In the leading State case distinguishing Silver, the Supreme Court of California overturned its Automobile Guest Statute and stated that:

> In Silver the plaintiff had attacked the statute solely on the ground that the distinction drawn between automobile guests and guests in other conveyances was impermissible; in rejecting this argument, the Supreme Court did not consider the reasonableness of the two additional statutory distinctions - between "guests" and paying passengers and between different categories of automobile guests whch are attacked in the instant case. In addition, because of the focus of the Plaintiff's argument, the Silver Court approached the guest statute simply as one of the many automobile regulatory measures then rapidly coming into existence, and rejected Plaintiffs constitutional challenge on the basis of the uniqueness of automobiles. That analysis however, is not adequate to justify the multilevel classification scheme involved in California's guest statute.

> Moreover, unlike the present case, the Connecticut statute reviewed in Silver was not set against the background of (1) almost universal automobile insurance and (2) such decisions as Rowland v. Christian.... Brown v. Merlo, Cal. Supr. 506 P.2d 212 at 217, 218 n.4 (1973).

In Sidle v. Majors, supra, cert. denied, 429 U.S. 945 (1976), a vigorous dissent from the denial of certiorari recognized that the States have followed the reasoning of Brown v. Merlo and urged reconsideration of the standard represented by Silver.

In light of this Court's reasoning in Kermarec and the overwhelming authority available from other Courts it is clear that the classification scheme embodied in a Premises Guest Statute such as 25 Del. C. §1501 is clearly violative of the equal protection clause of the Fourteenth Amendment and that the common law distinction of licensee/invitee are outmoded in our modern society.

For the foregoing reasons the Federal questions are substantial.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Harold Schmittinger, Esq.
414 South State Street
Dover, DE 19901
Counsel for Appellants

November 30, 1979

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,

Appellants,

v.

DOROTHY PENNINGTON,

Appellee.

APPELLANTS' APPENDIX

IN THE SUPREME COURT
OF
THE STATE OF DELAWARE

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,	*	
Plaintiffs Below, Appellants,	*	
v.	*	No. 244, 1978
DOROTHY PENNINGTON,	*	
Defendant Below, Appellee.	*	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

TO: T. Edgar Townsend, Jr.
Clerk of Supreme Court
Supreme Court Building
Dover, DE 19901

Notice is hereby given that Buford Bailey and Karoline L. Bailey, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme

Court of the State of Delaware, affirming the granting of summary judgment to the Defendant Below, Appellee, entered in this action on August 31, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SCHMITTINGER AND RODRIGUEZ, P.A.

BY /s/ Harold Schmittinger
Harold Schmittinger, Esquire
414 South State Street
Dover, DE 19901
Counsel for Appellants

PROOF OF SERVICE

AND NOW TO-Wit, this 27th day of November, A.D. 1979, I hereby certify that all parties required to be served have been served copies of the within Notice of Appeal, and that service has been made on Appellee pursuant to Rule 33(1) by mailing three copies via United States mail,

postage prepaid, on November 27, 1979, to Appellee's counsel of record: Robert G. Carey, Esquire, Box 1328, Wilmington, DE 19899.

SCHMITTINGER AND RODRIGUEZ, P.A.

BY /s/ Harold Schmittinger
Harold Schmittinger, Esquire
414 South State Street
Dover, DE 19901
Counsel for Appellants

IN THE SUPREME COURT
OF
THE STATE OF DELAWARE

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,	*	
Plaintiffs Below, Appellants,	*	
v.	*	No. 244, 1978
DOROTHY PENNINGTON,	*	
Defendant Below, Appellee.	*	

Submitted: May 7, 1979
Decided: August 31, 1979

Before HERRMANN, Chief Justice, DUFFY and McNEILLY, Justices.

Upon Appeal from Superior Court. Affirmed.

John Williams and Harold Schmittinger of Schmittinger and Rodriguez, P.A. Dover, for plaintiffs-appellants.

Robert G. Carey, of Prickett, Ward, Burt and Sanders, Wilmington, for defendant-appellee.

HERRMANN, Chief Justice:

This appeal requires a decision as to the constitutionality of the Delaware Premises Guest Statute, 25 Del. C. §1501.*

The plaintiffs, Mr. and Mrs. Buford Bailey, sued the defendant, Dorothy Pennington, for injuries sustained by Mr. Bailey while attending a party at the home of the defendant. Concluding that the plaintiffs were social guests of the defendant, and that the defendant's actions were neither wilful nor wanton,

*25 Del. C. §1501 provides:

"No person who enters onto the premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others."

the Superior Court granted summary judgment for the defendant on the basis of the Delaware Premises Guest Statute.

The Plaintiffs argue that the Statute does not apply to the facts of this case or, in the alternative, that the Statute is unconstitutional.

I.

Viewing the events in the light most favorable to the plaintiffs, as we must in our review of a decision granting summary judgment to the defendant, Wilson v. Tweed, Del. Supr., 209 A.2d 899, 900 (1965), these are the relevant facts:

The defendant invited about 50 friends, including the plaintiffs, to attend a corn roast at her home. Although not required to do so, the plaintiffs brought a fifth-size bottle of alcoholic liquor to the party. Four oil-burning torches on poles inserted into the ground,

used to repel insects, were placed around an outdoor dance floor. During the party, one of the torches was moved by the defendant and placed approximately five feet from the picnic tables occupied by the plaintiffs. The ground where the torch was relocated was dry and hard and, during the party, the torch fell over and spilled burning oil upon Mr. Bailey.

II.

The plaintiffs contend that the Premises Guest Statute was not applicable because they brought a bottle of liquor to the party. The argument goes that this case was taken out of the Statute by the "benefit" thus conferred upon the defendant. This contention deserves only brief notice:

The benefit to the defendant, if any, was "de minimis". Compare Facciolo v. Facciolo Construction Company, Del. Supr.,

317 A.2d 27, 28 (1974). In Justice v. Gatchell, Del. Supr., 325 A.2d 97, 104 (1974), this Court stated the following as a matter of policy regarding the analogous Delaware Automobile Guest Statute:*

> "***. Because application of the Automobile Guest Statute so often results in harsh, unfair, and unreasonable results, courts have shown a general tendency to carve out exceptions to the operation of the Statute in the interest of justice. Our own courts have demonstrated that tendency. ***. As a matter of policy, however, we do not favor further

*21 Del. C. §6101(a) provides:

"6101. Injury to nonpaying guest; exception as to passengers of public carriers and prospective purchasers of vehicles.

"(a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of other. ***"

judicial creation of exceptions to the Statute. If, as many believe, the Delaware Automobile Guest Statute leads so often to unreasonable and unjust results and should be repealed forthwith, let its evils stand revealed to the General Assembly without further judicial effort to avoid a bad law by patchwork exceptions."

III.

Since Bailey was a "guest without payment", §1501 bars his cause of action "unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others". There is no contention here that the accident was intentional. Compare Gallegher v. Davis, Del. Super., 183 A. 620, 622 (1936). Accordingly, we deal only with the "wilful or wanton disregard of rights" clause of §1501.

The plaintiffs contend that the conduct of the host/land occupier was wilful or wanton in character, and, thus,

within the expressed statutory exception because of the peril of the burning torch and its relocation within a few feet of the plaintiffs' table. The Trial Judge found that while the defendant's actions might be termed negligent, they were not wilful or wanton because "[t]he Defendant used the torch in the manner for which it was designed" without a "conscious indifference to the risk of harm to others". We agree.

Wilful or wanton conduct "assumes the character of maliciousness or wickedness * * *. Wilfulness cannot exist without purpose or design. The difference is one of kind, not degree. There is a clear distinction between wantonness and negligence, as the former term includes the elements of consciousness of one's conduct, realization of the probability of

injury to another, and disregard of the consequences." Gallegher v. Davis, 183 A. at 622.

There is no evidence that the defendant acted maliciously or wickedly, or with a conscious realization of the probability of injury to Mr. Bailey. This case does not fall within the statutory exception of wilful or wanton disregard of the rights of the plaintiff.

IV.

The plaintiffs contend that the Delaware Premises Guest Statute constitutes an unconstitutional violation of the so-called Remedy for Injury or Due Course of Law Clause of the Delaware Constitution and the Equal Protection and Due Process Clauses of the United States Constitution.

A.

The Remedy for Injury Clause of the Delaware Constitution is contained in Art. I, §9:

> "All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense; and every action shall be tried in the county in which it shall be commenced, unless when the judges of the court in which the cause is to be tried shall determine that an impartial trial thereof cannot be had in that county. Suits may be brought against the State, according to such regulations as shall be made by law."

This Clause "is inserted in the Constitution to secure the citizen against unreasonable and arbitrary deprivation of rights whether relating to life, liberty, property, or fundamental rights of action

relating to person or property * * *. It embraces the principle of natural justice that in a free government every man should have an adequate legal remedy for injury done him by another." Gallegher v. Davis, 183 A. at 624. In order to demonstrate a violation of the Remedy for Injury Clause, the plaintiffs must show that the Premises Guest Statute unreasonably deprives them of a fundamental right of action.

In Gallegher, the Court rejected the argument that similar provisions in the Delaware Automobile Guest Statute, barring suits by a guest against a host unless the host driver acted wilfully or wantonly, violated the Remedy for Injury Clause. The Court there noted that, although an automobile guest may have had a remedy for the negligent acts of his host driver at common law, the modification of that right did not violate the

Remedy for Injury Clause, because "no one has vested interest in any rule of the common law". 183 A. at 624. As we stated in Justice v. Gatchell, 325 A.2d at 99, "the holding in Gallegher [as to the effect of Del. Const. Art. I, §9 upon the Delaware Automobile Guest Statute] * * * has withstood the tests of time and challenge in this State."

This challenge to the Premises Guest Statute under Art. I, §9 lies on weaker ground: at common law, an automobile guest had the right to sue for the negligence of the host, but a guest had no right to sue a host for the host's negligence in the latter's home. Since the plaintiffs had no right to sue for negligence prior to the enactment of the Statute, the Statute cannot be said to operate unreasonably to deprive them of a fundamental right.

Accordingly, we hold that the Delaware Premises Guest Statute, like the Delaware Automobile Guest Statute, does not violate Del. Const. Art. I, §9.

B.

The plaintiffs contend that the Delaware Premises Guest Statute violates the Equal Protection Clause of the Fourteenth Amendment because the "distinctions drawn between guests without payment and all other individuals, except trespassers, who may be injured by the land occupier on his premises have no rational basis." The plaintiffs urge this Court to "adopt a rule whereby an owner or occupier of land has a duty to exercise reasonable care to insure the safety of all persons reasonably anticipated to be present on the property, regardless of their legal status under either the common law or 25 Del. C. §1501."

In Justice, we were confronted with substantially the same Equal Protection challenges as to the Delaware Automobile Guest Statute. The similarities of scope and purpose of the two Statutes are manifest. "The difference between an invitation extended by a person to dine with him at his home and an invitation to ride with him in his automobile is difficult to perceive." Gallegher v. Davis, 183 A. at 625. We adhere to the rationale adopted and conclusions reached in Justice and apply them to the Delaware Premises Guest Statute. We remain convinced that the General Assembly, which created both of these Statutes, must undo whatever evils or unfairnesses have arisen under them in modern day circumstances. Compare Anno., 66 A.L.R. 3rd 532 (1975).

Accordingly, we hold the Delaware Premises Guest Statute valid under the Equal Protection Clause.

The plaintiffs urge the abandonment of the common law status and liability distinctions between an invitee, a licensee, and a trespasser, relying upon the leading case of Rowland v. Christian, Calif. Supr., 443 P.2d 561 (1968) and its progeny. Concededly, there is a "modern trend" in that direction. See Smith v. Arbaugh's Restaurant, Inc., U.S. App. Ct., D. C., 469 F.2d 97, 100 (1972); Sherman v. Suburban Trust Co., Mf. Ct. App., 384 A.2d 76, 81 (1978). Insofar as Delaware's Guests' Statutes and their terminologies are concerned, we decline to abandon the common law classifications as they existed and were used when the Statutes were enacted - again for the reason that to do otherwise would be to engage in impermissible judicial legislation.

C.

Finally, the plaintiffs assert that §1501 is an unconstitutional denial of due process of law under Del. Const. Art. I, §9 and the Fourteenth Amendment. Their contention is that a person who is injured by the negligent conduct of another is entitled to bring a legal action to recover for the injuries sustained; that due process of law so requires. The argument goes that the common law status classifications and §1501 deny such legal recourse; and that the due process right guarantees that each individual shall have a right to pursue his legal remedies without the undue restrictions imposed by the common law classifications as used in §1501.

These contentions amount to no more than a repetitious attack upon the decision in Gallegher holding that the

Delaware Automobile Guest Statute was not violative of the Remedy for Injury or Due Course of Law Clause of Art. I, §9. In Justice, we expressly recognized that the attack in Gallegher was based upon the "due course of law" provision of Del. Const. Art. I, §9 and that the holding of constitutionality thereunder "has withstood the tests of time and challenge in this State." 325 A.2d at 99.

We are not persuaded that the rules of either Gallegher or Justice, which control in this case by analogy, should be changed or abandoned. We recognize Primes v. Tyler, Ohio Supr., 331 N. E.2d 723 (1975), and Johnson v. Hassett, N.D. Supr., 217 N. W.2d 771 (1974), upon which plaintiffs rely in urging the upset of the Premises Guest Statute upon the ground of denial of remedy by due course of law. With due

deference to those authorities, we adhere to the principles and conclusions of Gallegher and Justice.

* * * * *

Accordingly, for the reasons stated, we conclude that the Superior Court correctly granted summary judgment in favor of the defendant in this case.

* * * * *

Affirmed.

STATE OF DELAWARE *
*
KENT COUNTY *

SS.

I, T.E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Opinion decided August 31, 1979, in Bailey v. Pennington, No. 244, 1978, as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I, have hereunto set my hand and affixed the seal of said Court at Dover this 24th day of September, A.D. 1979.

/s/T.E. Townsend, Jr.
Clerk of the Supreme Court

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BAILEY vs. PENNINGTON * No. 244, 1978
* C. A. No. 141, 1976
* Prothonotary
* New Castle County
*

The following docket entry has been made in the above cause.

1979, Sept. 24. Record, mandate and certified copy of Opinion decided August 31, 1979 to Clerk of Court below.

cc: The Honorable Bernard Balick
John Schmittinger, Esq.
Robert G. Carey, Esq.

Prothonotary
Received Above
By: /s/ Barbara M. Hrinek
Date 9/25/79

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court

Date: 9-24-79

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,

Plaintiffs,

-vs-

DOROTHY PENNINGTON,

Defendant.

Civil Action No. 141

1 9 7 6

BEFORE:

HON. BERNARD BALICK, J.

APPEARANCES:

SCHMITTINGER & RODRIGUEZ, P.A.
BY: JOHN WILLIAMS
On behalf of the Plaintiffs

PRICKETT, WARD, BURT & SANDERS
BY: ROBERT G. CAREY
On behalf of the Defendant

- - - - -

OPINION OF THE COURT

- - - - -

August 1, 1978
9:40 o'clock a.m.
In Chambers

THE COURT: This comes before the Court on the Defendant's motion for summary judgment. The Plaintiffs filed this action for personal injuries. The basis for the motion for summary judgment is that there is no material issue of fact in that, under the premises guest statute, the Plaintiffs must prove willful or wanton disregard of their rights by the Defendant in order to prevail, and that the record fails to support that contention as a matter of law.

The Plaintiffs challenge the constitutionality of the premises guest statute; contend that there is payment, making the statute inapplicable; contend that there are material issues of fact barring summary judgment; and finally contend that the risk of injury was so

great, considering the nature of the article that caused the injury, that a jury issue is raised as to whether the Defendant's conduct constituted willful or wanton disregard of the Plaintiffs' rights.

The basic facts are not in dispute. The Defendant was having a corn roast on her premises and had invited a number of guests, including the Plaintiffs. At the corn roast the Defendant served beer as well as food, and the Plaintiffs brought their own "hard liquor". The Defendant had obtained some torches, through her brother, for the purpose of lighting the dance area and repelling insects. At some point, one of the torches was moved from its original location to a point closer to the large picnic table where the guests were eating. Apparently, there had been complaints about insufficient lighting, and that was

the reason the torch was moved. The torches are on hollow metal poles that come in sections, and the top contains flammable liquid. At some point, the torch that had been moved, fell over and the flammable liquid poured onto the Plaintiff, who received burns, and who also received a back injury as someone jumped on him in an effort to extinguish the flames.

There is a dispute of fact as to who moved the torch. The Defendant and her brother both say that he moved it. On the other hand, the Plaintiffs testify that the Defendant moved it. It is not absolutely clear what caused the torch to fall over. The Defendant and her brother testify that children were running by, and raise an inference that the torch might have been knocked over. On the other hand, the Plaintiffs say that no one was

near the torch when it fell over, and raise an inference that it simply was not sufficiently embedded in the earth.

Perhaps I should point out that the poles of the torches have a point and are put up by being embedded in the earth. The Defendant's brother testified that he put them in the ground by hammering the top of the pole with a claw hammer and then putting the container of oil on top when that was accomplished.

I conclude that there are no genuine issues of material fact. It is true that there are issues of fact, as I have just pointed out, and it is not perfectly clear what happened, but I conclude that any dispute of fact is not material. In other words, one can accept the facts and inferences favorably to the Plaintiffs' point of view; in short, that the Defendant herself moved the torch and that it was not sufficiently embedded in

the earth and fell over without being knocked over by the children, but nevertheless resolve the case on the motion for summary judgment.

First of all, I conclude that the challenge to the constitutionality of the premises guest statute must fail because the issue is controlled by the decision of the Supreme Court of Delaware upholding the constitutionality of the automobile guest statute.

I further conclude that, as a matter of law, there was no payment in this case. This is a clear case of a purely social activity, and the fact that the Plaintiffs brought their own liquor to the corn roast does not constitute payment or economic benefit, in my view, as a matter of law.

Finally, the issue is presented whether the undisputed facts, or facts taken in the light most favorably for the

Plaintiffs, raise a jury question as to whether the Defendant's conduct was a willful or wanton disregard of the Plaintiffs' rights.

The Court rarely grants summary judgment in an action based on negligence because the jury plays the important function of concluding whether the Defendant's action was reasonable. However, courts will grant summary judgment on occasion in negligence actions, and will do so more readily where the standard is willful or wanton conduct rather than simple negligence. I conclude that this is a case where summary judgment is appropriate.

Recognizing that the torches were dangerous in the sense that any item that contains burning oil or similar liquid is dangerous, this, nevertheless, is a case where obviously there was no conscious indifference to the risk of harm

to others. The Defendant used the torch in the manner for which it was designed, and perhaps was negligent in putting the torch in the ground, but I think it plain that her conduct did not rise to willful or wanton disregard of the Plaintiffs' rights.

In short, the magnitude of the risk, which is the factor on which the Plaintiffs rest their argument against summary judgment, is a relevant consideration, and might well lead to a conclusion of negligence, but willful or wanton disregard of another's rights is a different kind of conduct, and under the circumstances of this case I do not think the magnitude of the risk was such as to raise a permissible inference or support a conclusion that there was willful or wanton disregard of the Plaintiffs' rights.

In conclusion, I think the premises guest statute requires entry of judgment for the Defendant.

- - - - -

STATE OF DELAWARE *
*
NEW CASTLE COUNTY *

C E R T I F I C A T E

I, David G. Meddings, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing OPINION OF THE COURT is an accurate transcript of said OPINION, as reported by me, in the Superior Court of the State of Delaware, in and for New Castle County, in the case herein stated, as the same remains of record in the Office of the Prothonotary of New Castle County, at Wilmington, Delaware.

WITNESS my hand this 3rd day of August, 1978.

David G. Meddings
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,	*	C. A. No. 141, 1976
Plaintiffs,	*	
v.	*	
DOROTHY PENNINGTON,	*	
Defendant.	*	

ORDER

AND NOW, TO-WIT, this 22nd day of August, A.D., 1978, the Defendant's Motion for Summary Judgment pursuant to Delaware Superior Court Civil Rule 56 and the Plaintiffs' Motion to Strike or in the Alternative for Summary Judgment pursuant to Delaware Superior Court Civil Rules 12(f) and 56(d) having been presented to the Court and duly considered, it is,

ORDERED, that the Defendant's Motion for Summary Judgment be and hereby is granted for the reasons that there was not an economic benefit conferred by the Plaintiffs upon the Defendant such that the Delaware Premises Guest Statute (25 Del. C. §1501) would be rendered inapplicable; that the conduct of the Defendant, although perhaps negligent, was not intentional or a wilful and wanton disregard of the rights of the Plaintiffs; and that there was not any issue of material fact remaining in the case for presentation to the jury.

FURTHER ORDERED, that the Plaintiffs' Motion to Strike or in the Alternative for Summary Judgment be and hereby is denied for the reason that the constitutionality of the Delaware Premises Guest Statute (25 Del. C. §1501) is upheld

on the basis of the Delaware Supreme Court decision in the case of Justice v. Gatchell, 325 A.2d 97 (1974).

IT IS SO ORDERED.

/s/ Bernard J. Balick
JUDGE

APPROVED AS TO FORM:

SCHMITTINGER & RODRIGUEZ, P.A.

BY: /s/ John Williams
John Williams, Esquire
414 Market Tower
901 Market Street
Wilmington, DE 19801

Attorney for Plaintiffs,
Buford and Karoline Bailey

PRICKETT, WARD, BURT & SANDERS

BY: /s/ Robert G. Carey
Robert G. Carey, Esquire
1310 King Street
P.O. Box 1328
Wilmington, DE 19899

Attorney for Defendant,
Dorothy Pennington

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BUFORD BAILEY and KAROLINE L. BAILEY, his wife,	*	C.A. No. 141, A.D. 1976
Plaintiffs,	*	
v.	*	
DOROTHY PENNINGTON,	*	MOTION TO STRIKE OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
Defendant.	*	

COME NOW, Plaintiffs, Buford Bailey and Karoline L. Bailey, his wife, by and through their attorneys, Schmittinger and Rodriguez, and move the Court pursuant to Superior Court Civil Rule 12(f) and 56(d) for an order striking, or in the alternative granting summary judgment dismissing Defendant's defense, denominated First Affirmative Defense in paragraph 9 of the Answer, on the grounds that it is insufficient as a matter of law in that:

1. 25 Del. C. §1501 violates the Remedy for Injury clause of Article I, Section 9 of the Constitution of the State of Delaware; and

2. 25 Del. C. §1501 violates the equal protection provisions of the Delaware Constitution and the Fourteenth Amendment to the United States Constitution; and

3. 25 Del. C. §1501 violates the due process clauses of the Fourteenth Amendment to the United States Constitution, and Article I, Section 9 of the Delaware Constitution.

SCHMITTINGER & RODRIGUEZ, P.A.

By /s/ Harold Schmittinger
Harold Schmittinger, Esquire
414 South State Street
Dover, Delaware 19901
Attorneys for Plaintiffs

DATED: February 25, 1977

Supreme Court, U.S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-841

BUFORD BAILEY and KAROLINE L. BAILEY, His Wife,
Appellants,

v.

DOROTHY PENNINGTON,
Appellee.

On Appeal From the Supreme Court of Delaware.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

MASON E. TURNER, JR.,
ROBERT G. CAREY,
PRICKETT, SANDERS, JONES, ELLIOTT & KRISTOL,
1310 King Street,
P. O. Box 1328,
Wilmington, Delaware. 19899
Attorneys for Appellee.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
OPINION BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
The Appeal Should Be Dismissed or Summarily Affirmed Because It Fails to Present a Substantial Federal Question	5
A. The Appellants Have Assumed a Heavy Burden in Seeking to Have Legislation Enacted by the General Assembly of the State of Delaware Declared Unconstitutional	5
B. Delaware's Premises Guest Statute Is a Legislative Codification of the Traditional Common Law and a Proper Exercise of the Police Power by the General Assembly of the State of Delaware	7
C. Rowland, Merlo and Kermarec Are Not Authority to Declare Delaware's Premises Guest Statute Unconstitutional	12
D. Merlo's Mixed Reviews	15
CONCLUSION	24
PROOF OF SERVICE	25

TABLE OF CITATIONS.

Cases: Page

Acton v. Wilmington & N. R. R. Co., Del. Supr., 407 A. 2d 204 (1979) 8, 11
Allied Stores of Ohio v. Bowers, 358 U. S. 522 (1959) 6
Bailey v. Pennington, Del. Supr., 406 A. 2d 44 (1979) 4
Bailey v. Sears, Roebuck & Co., Civil Action No. 77C-AU-26, Superior Court of the State of Delaware in and for New Castle County 4
Beasley v. Bozeman, Ala., 315 S. 2d 570 (1975) 19
Behrns v. Burke, S. D., 229 N. W. 2d 86 (1975) 19
Brady v. Acs, 264 Ind. 285, 342 N. E. 2d 837 (1976) 19
Brown v. Merlo, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 66 A. L. R. 3d 505, 506 P. 2d 212 (1973) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23
Cannon v. Oviatt (Utah), 520 P. 2d 883, appeal dismissed, 419 U. S. 810, reh. denied 419 U. S. 1060 (1974) 17, 19, 21
Caroff v. Liberty Lumber Co., 146 N. J. Super. 353, 369 A. 2d 983 (1977) 9
Clendaniel v. Conrad, Del. Supr., 83 A. 1036, error dismissed 235 U. S. 712 (1929) 5
Cohen v. Krigstein, Del. Super., 114 A. 2d 225 (1955) 11
Coleman v. Rhodes, Del. Supr., 159 A. 649 (1932) 14
Copeland v. Larson, 46 Wis. 2d 337, 174 N. W. 2d 745 (1970) 9
Dandridge v. Williams, 397 U. S. 471 (1970) 5, 23
Delaney v. Badame, 49 Ill. 2d 168, 274 N. E. 2d 353 (1971) 19
DiSabatino Bros., Inc. v. Baio, Del. Supr., 366 A. 2d 508 (1976) 11
Duerst v. Limbocker, 209 Or. 252, 525 P. 2d 99 (1974) 18
Durney v. St. Francis Hospital, Inc., Del. Super., 83 A. 2d 753 (1951) 22
Fields v. Synthetic Ropes, Inc., Del. Super., 221 A. 2d 617 (1965) 11
Frontiero v. Richardson, 411 U. S. 677 (1973) 7
Gallegher v. Davis, Del. Supr., 183 A. 620 (1936) 6, 8, 14, 15, 20, 23

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Gibbes v. Zimmerman, 290 U. S. 326 (1933) 7
Heider v. Michigan Sugar Company, 375 Mich. 490, 134 N. W. 2d 637, cert. granted 303 U. S. 905, cert. denied 385 U. S. 362 (1966) 9
Henry v. Bauder, 213 Kan. 751, 518 P. 2d 362 (1974) 16, 19
Hicks v. Miranda, 422 U. S. 332 (1975) 20, 21
Hill v. Garner, 277 Or. 641, 561 P. 2d 1016, dismissed for want of a substantial federal question, 98 S. Ct. 623 (1977) .. 19
Johnson v. Hassett, 217 N. W. 2d 771 (N. D. 1974) 17, 19
Justice v. Gatchell, Del. Supr., 325 A. 2d 97 (1974) ..4, 10, 15, 19, 20, 22, 23
Keasling v. Thompson, 217 N. W. 2d 687 (Iowa 1974)..6, 17, 18, 19
Kermarec v. Compagnie Generale Transatlantique, 358 U. S. 625 (1959) 12, 13
Ker v. Messmer, 96 Idaho 75, 524 P. 2d 536 (1974) 19, 20
Laakonen v. Eighth Judicial District Court, 91 Nev. 506, 538 P. 2d 574 (1975) 19
Makin v. Mack, Del. Ch., 336 A. 2d 230 (1975) 11
Manistee Bank and Trust Co. v. McGowan, 394 Mich. 655, 232 N. W. 2d 636 (1975) 19
McGeehan v. Bunch, 88 N. M. 308, 540 P. 2d 238 (1975) ... 19
McGowan v. Maryland, 366 U. S. 420 (1961) 6, 7
Neu v. Grant (10th Cir. 1977), 548 F. 2d 281 19
New York Cent. R. Co. v. White, 243 U. S. 188 (1917) 8
O'Connell v. Forrest Hill Field Club, 119 N. J. Super. 317, 291 A. 2d 386 (1972) 10
Odar v. Chase Manhattan Bank, 138 N. J. Super. 464, 351 A. 2d 389 (App. Div. 1976) 10
Praznik v. Sport Aero, Inc., 42 Ill. App. 3d 330, 355 N. E. 2d 683 (1976) 19
Primes v. Tyler, 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975) 19, 20, 23
Pritchard v. Norton, 106 U. S. 124 (1882) 7
Reed v. Reed, 404 U. S. 71 (1971) 6, 7

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Retza v. Fortune, 409 U. S. 810 (1972) 20, 21, 23
Richardson v. Hansen, 186 Colo. 346, 527 P. 2d 536 (1974) .. 19
Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561, 32 A. L. R. 3d 496 (1968) 10, 12, 13, 14, 23
Sidle v. Majors, 536 F. 2d 1156 (7th Cir. 1976), cert. denied, 429 U. S. 945 (1976) 19, 21
Shellhorn & Hill, Inc. v. State, Del. Supr., 187 A. 2d 71 (1962) 11
Silver v. Silver, Conn., 143 A. 240, 65 A. L. R. 943, aff'd 280 U. S. 117 (1929) 5, 8, 12, 15, 20, 21, 23
Smith v. Arbaugh's Restaurant, Inc., 469 F. 2d 97 (D. C. Cir. 1972) 10, 11
Snyder v. I. Jay Realty Co., 30 N. J. 303, 153 A. 2d 1 (1959) 8
Stoehr v. Whipple, 405 F. Supp. 1249 (D. Neb. 1976) 19
Strahorn v. Sears, Roebuck & Co., Del. Super., 123 A. 2d 107 (1956) 22
Thompson v. Hagan, 96 Idaho 19, 523 P. 2d 1365 (1974) 17, 19, 20, 22
Tisko v. Harrison, 500 S. W. 2d 565 (Tex. Civ. App. 1973) 15, 19, 21
White v. Hughes, 257 Ark. 627, 519 S. W. 2d 70 (1975), dismissed for want of a substantial federal question, 423 U. S. 805 (1975) 19, 21
Williams v. Williams, Del. Supr., 369 A. 2d 669 (1976) 22
Williamson v. Lee Optical Co. of Oklahoma, 348 U. S. 483 (1955) 5
Wright v. Alabama Power Co., 355 S. 2d 322 (Ala. 1978) ... 9

Statutes:

California Automobile Guest Statute 13, 14
Connecticut Automobile Guest Statute 12, 15, 21
Delaware Automobile Guest Statute 14, 20, 22, 23
Delaware's "Premises Guest Statute", 59 Del. Laws Ch. 171, § 1 (1973), codified at 25 Del. C. § 1501 ..... 2, 3, 4, 7, 8, 9, 10, 11, 12, 14, 20, 23

TABLE OF CITATIONS (Continued).

Statutes (Continued): Page

Illinois Aviation-Guest Statute 19
Ohio Guest Statute 20
47 Del. Laws, Chaper 47(a) 15
59 Del. Laws, Ch. 171, § 1 (1973) 10
N. H. Rev. Stat. Ann. § 212-34 (1964) 9
Acts of Ala. 1965, p. 663, § 35-15-4 et seq. (Code 1975) 9
Judiciary Act of 1789, 28 U. S. C. A. § 1333 12
"Landowner's Liability Act," N. J. S. A., 2A:42A-1 et seq. ... 10
Occupier Liability Act, 1957, 5 and 6 Eliz. 2, c. 31 14
California Code, § 1714 13
6 Del. C. § 2714 10
10 Del. C. §§ 8106-8119 10
21 Del. C. § 2902 22
25 Del. C. § 1421 10
United States Constitution:
Generally 14
Art. 3, § 2 12
Fourteenth Amendment 2, 7, 11, 15, 16, 18, 21

Other Authorities:

16 Am. Jur. 2d, Constitutional Law §§ 259, et seq. 5
Anno: 25 A. L. R. 2d at 44 (1952) 13
Anno: 32 A. L. R. 3d 496 (1970) 16
Del. R. Civ. Proc. 12(b)(6) 3
Del. R. Civ. Proc. 56 4
"Judicial Nullification of Guest Statutes", 40 S. Cal. L. Rev. 884 (1968) 6
Restatement (Second) of Torts, §§ 341, 341A, 342 (1965) ... 11, 14
2A Sands, Sutherland Statutory Construction (4th Ed. 1972) § 50.05 11
Supreme Court Rule 16 1
44 N. Y. U. L. Rev. 426 (1969) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-841.

BUFORD BAILEY and
KAROLINE L. BAILEY, his wife,
Appellants,

v.

DOROTHY PENNINGTON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF DELAWARE.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The Appellee moves the Court, pursuant to Supreme Court Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware entered on August 31, 1979, on the ground that the question on which the decision depends does not present a substantial Federal question.

OPINION BELOW.

The opinion of the Supreme Court of Delaware is reported at 406 A. 2d 44 and is set forth in the Appellants' Appendix at p. 5a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Fourteenth Amendment to the Constitution of the United States:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Delaware's "Premises Guest Statute" [1], 59 *Del. Laws* Ch. 171, § 1 (1973), codified at 25 *Del. C.* § 1501, which reads:

> "No person who enters onto the premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others."

QUESTION PRESENTED.

Whether 25 *Del. C.* § 1501, which is a codification of the traditional common law that a person's status determines the duty owed to him by a landowner, violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

1. Throughout this brief the statute will be referred to as the "premise's" or "landowner's" guest statute. The formal title is "Liability of Owners or Occupiers of Land for Injury to Guests or Trespassers." 25 *Del. C.* § 1501.

STATEMENT OF THE CASE.

On August 9, 1975, the Appellant, Buford Bailey, was Appellee's guest at her home on Smithville Road, Newark, Delaware. Appellee had invited about 50 guests for a "corn roast". Four insect repellent torches were placed about the Apellee's property to ward off bugs and insects. The torches consisted of a stick, with a plastic cup at the top in which sat a metal cup containing burning lamp oil.

At a time during the corn roast, one torch was moved nearer the picnic table. In some manner, that burning insect repellent torch fell, or was knocked over, onto the Appellant. Mr. Bailey claims that he sustained certain injuries as a result of the ensuing fire.

Based on those facts, the Appellants filed a complaint on February 4, 1976, alleging that the Appellee was negligent in certain respects.

On February 27, 1976, the Appellee moved to dismiss the Complaint under Rule 12(b)(6) [2] for failure to state a claim upon which relief may be granted. The motion was based on Delaware's Premises Guest Statute, 25 *Del. C.* § 1501. On presentation of the motion, an Order was entered by the Delaware Superior Court dismissing the complaint but permitting the Appellants to file an amended complaint no later than March 12, 1976.

Appellants timely complied with the Order of the Court and, on or about March 9, 1976, filed an amended complaint alleging that the Appellee was wantonly negligent.[3]

2. Del. R. Civ. Proc. 12(b)(6). Delaware adopted the Federal Rules of Civil Procedure in 1948.

3. Appellants also continued to assert a claim based on negligence by claiming they were not "guests without payment" because they had conferred a benefit upon the Appellee by bringing a bottle of liquor to the corn roast. Appellants' Appendix, pp. 8a and 29a.

The Appellee asserted in her answer, as an affirmative defense, the Premises Guest Statute, 25 *Del. C.* § 1501, and thereafter moved for summary judgment.[4] The Delaware Superior Court granted defendant's motion for summary judgment.[5] An appeal was perfected to the Delaware Supreme Court which affirmed the lower Court under the rationale of *Justice v. Gatchell.*[6] This appeal followed.

4. Del. R. Civ. Proc. 56. During the course of briefing the motion for summary judgment below, the Appellants filed a product liability action against the manufacturer and seller of the torches, which action is still in the discovery stages. *Bailey v. Sears, Roebuck & Co.*, Civil Action No. 77C-AU-26, Superior Court of the State of Delaware in and for New Castle County. Cf. Appellants' Jurisdictional Statement, p. 16, in which they state that if 25 *Del. C.* § 1501 is constitutional, "there will be no alternative remedies available to" them.

5. Appellants' Appendix, p. 24a.

6. *Bailey v. Pennington*, Del. Supr., 406 A. 2d 44 (1979); *Justice v. Gatchell*, Del. Supr., 325 A. 2d 97 (1974).

ARGUMENT.

The Appeal Should Be Dismissed or Summarily Affirmed Because It Fails to Present a Substantial Federal Question.

A. The Appellants Have Assumed a Heavy Burden in Seeking to Have Legislation Enacted by the General Assembly of the State of Delaware Declared Unconstitutional.

The police power of the State of Delaware is vested in its General Assembly which, within constitutional limits, is the sole judge as to when and how the police power[7] of Delaware is to be exercised for the protection and welfare of Delawareans. A proper legislative determination as to the necessary exercise of that police power and the method to be employed is conclusive upon the courts.[8]

In *Williamson v. Lee Optical Co. of Oklahoma*,[9] this Court, with respect to equal protection, said:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think.[10]

Courts must not arrogate to themselves legislative power and authority to determine statutes unconstitutional by

7. See 16 Am. Jur. 2d, *Constitutional Law* §§ 259, et seq.

8. *Silver v. Silver*, Conn., 143 A. 240, 65 A. L. R. 943, aff'd 280 U. S. 117 (1929); *Clendaniel v. Conrad*, Del. Supr., 83 A. 1036, error dismissed 235 U. S. 712 (1929).

9. 348 U. S. 483 (1955).

10. Id. at 489. See also *Dandridge v. Williams*, 397 U. S. 471, 485 (1970).

"modern" standards under "present day" conditions in an over-zealous effort to effect perceived long-overdue reform.[11] Nor is it necessary that the Court agree that the statute is a wise, sound and appropriate public policy.[12] The primary function and responsibility of Delaware's General Assembly is, in its wisdom, to weigh and determine the desirability of legislation affecting the social, economic and political policy of the State.

In challenging Delaware's premise's guest statute, the Appellants have assumed a heavy burden.[13] Every legislative act is presumptively constitutional, and any question of its validity must be resolved in favor of the statute, especially where the alleged discrimination is not based on race, color, religion, ancestry or financial position.[14]

The creation of distinct classifications of persons is not denied the legislature by the equal protection clause [15] and a scheme of classification is permissible if any state of facts can be conceived reasonably to sustain it.[16]

In short, it is settled that a statute must be held valid if it is possible for the Court to do so; every presumption must be resolved in favor of the statute's validity; and the Court must not be concerned with the wisdom of the object the General Assembly of the State of Delaware sought to accomplish.[17]

---

11. *Keasling v. Thompson,* 217 N. W. 2d 687 (Iowa 1974). See also "Judicial Nullification of Guest Statutes", 40 S. Cal. L. Rev. 884 (1968).

12. *McGowan v. Maryland,* 366 U. S. 420 (1961).

13. *Keasling v. Thompson, supra.*

14. *Allied Stores of Ohio v. Bowers,* 358 U. S. 522 (1959).

15. *Reed v. Reed,* 404 U. S. 71 (1971).

16. *Allied Stores of Ohio v. Bowers, supra.*

17. See *Gallegher v. Davis,* Del. Supr., 183 A. 620 (1936).

B. Delaware's Premises Guest Statute Is a Legislative Codification of the Traditional Common Law and a Proper Exercise of the Police Power by the General Assembly of the State of Delaware.

Appellants on this appeal urge the Court to declare Delaware's Landowner's Guest Statute an unconstitutional denial of due process and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. In fact, Delaware's Premises Guest Statute is constitutional under the "new equal protection" [18], the "traditional equal protection" [19], or the "strict scrutiny" [20] tests.

Appellants assert that 25 *Del. C.* § 1501 is a "derogation of the common law rule generally allowing recovery for injuries incurred from the negligent conduct of another, guaranteed by the Federal Constitution".[21] Appellants also urge that *"Pritchard* [22] and *Gibbes* [23] suggest that a state statute which deprives a common law right of action can withstand due process attack *only* if there is some other form of remedy available to the injured party." [24]

---

18. *Frontiero v. Richardson,* 411 U. S. 677 (1973).

19. Id. *McGowan v. Maryland, supra.*

20. *Reed v. Reed, supra.*

21. Appellants' Jurisdictional Statement at p. 13.

22. *Pritchard v. Norton,* 106 U. S. 124 (1882).

23. *Gibbes v. Zimmerman,* 290 U. S. 326 (1933).

24. Appellants' Jurisdictional Statement, p. 16—Emphasis in the original. See also p. 26. But cf. p. 9, where appellants state that they contended on appeal to the Delaware Supreme Court that "the common law status classifications codified in 25 *Del. C.* § 1501" deprived them of due process.

Briefly stated, the answer to Appellants' contentions is that 25 *Del. C.* § 1501 is not in derogation of the common law; it is a codification of the common law. The statute is not an absolute bar to recovery. The proof required of, for example, a licensee who sues a landowner "is a legislative reflection of the traditional statements of the common law duty owed by property owners . . .".[25]

The statute does not involve a legislative modification of the nature and extent of a landowner's duty,[26] nor the "creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object." [27] Moreover, in enacting the Premises Guest Statute, the Delaware General Assembly did "not abolish the common law right of action to recover damages for negligent injury without substituting another substantially adequate remedy . . .".[28]

In *Snyder v. I. Jay Realty Co.*,[29] the Court stated that the

> . . . historically based view of common law [is] that the duty owed by an occupier of land to third persons coming thereon is determined according to the status of such third person, i.e., invitee, licensee or trespasser. Indeed, the ascertainment of that status is an essential preliminary to the application of the particular standard of care to be exercised by the land occupier. (Citations omitted). These common law classifications are sufficiently flexible to fulfill the purposes of our legal system in serving the needs of present day society.[30]

25. *Acton v. Wilmington & N. R. R. Co.*, Del. Supr., 407 A. 2d 204 (1979) (No. 229, 1978), see Appellants' Appendix, pp. 1-5.

26. *Acton v. Wilmington & N. R. R. Co., supra; Gallegher v. Davis, supra; New York Cent. R. Co. v. White*, 243 U. S. 188 (1917).

27. *Silver v. Silver*, 280 U. S. 117, 122 (1929).

28. *Gallegher v. Davis, supra* at 625.

29. 30 N. J. 303, 153 A. 2d 1 (1959).

25 *Del. C.* § 1501 is nothing more than the legislative recognition of the traditional common law tort doctrine that the status of a person determines the duty owed to him by the owner or occupier of land.

Delaware is not unique in this area. Twenty-eight [31] states have enacted legislation codifying the common law as it related to specified landowners. The constitutionality of the Illinois statute was upheld in *Heider v. Michigan Sugar Company.*[32]

The preamble to the New Hampshire statute states that its purpose is expressly "to codify the common law, in respect to the duty of care owed by landowners toward others who may be on their premises for sporting and recreational purposes and not for purposes connected with the landowner's own business." [33]

With respect to a similar Wisconsin statute, the Court in *Copeland v. Larson*, said that it "must be considered as a special reversal or exemption to this tendency [to enlarge the duty of landowners and minimize the distinction between licensees and invitees and is] based upon a special public policy." [34]

30. 153 A. 2d at 5. See also *Caroff v. Liberty Lumber Co.*, 146 N. J. Super. 353, 369 A. 2d 983, 985 (1977).

31. See *Copeland v. Larson*, 46 Wis. 2d 337, 174 N. W. 2d 745, 749-750, n. 4 (1970).

32. 375 Mich. 490, 134 N. W. 2d 637, cert. granted 303 U. S. 905, cert. denied 385 U. S. 362 (1966).

33. N. H. Rev. Stat. Ann. § 212-34 (1964). See also *Copeland v. Larson, supra* at 749. Alabama's statute has a similar preamble; Acts of Ala. 1965, p. 663, § 35-15-4 et seq. (Code 1975). See *Wright v. Alabama Power Co.*, 355 S. 2d 322 (Ala. 1978).

34. *Copeland v. Larson, supra* at 749.

Delaware's neighboring state, New Jersey, has enacted the "Landowner's Liability Act." [35] In *O'Connell v. Forrest Hill Field Club*,[36] the Court also said that the Act "must be considered an exemption to the growing tendency of the Court to enlarge the landowner's duty in respect to negligence." [37]

Delaware's Premises Guest Statute does not contain a preamble.[38] Nonetheless, it is reasonable to assume that the Delaware General Assembly, aware of the new approach evidenced by *Rowland*,[39] specifically rejected that trend by codifying the traditional distinctions [40] between invitees, licensees and trespassers.[41]

Accordingly, *Smith v. Arbaugh's Restaurant, Inc.*,[42] and the other cases cited by Appellants as authority for the "strong trend" [43] to abolish the common law distinctions are not applicable to the case at bar. Chief Judge Bazelon said that the "classifications . . . are judicial

35. N. J. S. A., 2A: 42A-1 et seq.

36. 119 N. J. Super. 317, 291 A. 2d 386 (1972).

37. Id. at 388. See also *Odar v. Chase Manhattan Bank*, 138 N. J. Super. 464, 351 A. 2d 389 (App. Div. 1976).

38. See 59 *Del. Laws*, Ch. 171, § 1 (1973).

39. *Rowland v. Christian*, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561, 32 A. L. R. 3d 496 (1968).

40. Distinctions are made in areas of the law other than in tort arena. Guest statutes distinguish between guests and non-guests. The Statute of Frauds distinguishes between oral and written contracts. An oral contract which cannot be performed within one year is unenforceable. That same contract reduced to writing is enforceable. See 6 *Del. C.* § 2714; *Justice v. Gatchell*, *supra*, p. 103, n. 10. Statutes of limitations arbitrarily deny equal treatment to those who fail by hours or a few days to perfect claims within the prescribed periods. See e.g., 10 *Del. C.* §§ 8106-8119.

41. 25 *Del. C.* § 1501 added the category of trespassers in 1973 on repeal of the predecessor statute, 25 *Del. C.* § 1421.

42. 469 F. 2d 97 (D. C. Cir. 1972). Appellants' Jurisdictional Statement, p. 22.

43. Appellants' Jurisdictional Statement, p. 24.

creations which should be cast aside . . .".[44] But he first made clear that the Court could only abolish judge-made rules, and only "in the absence of legislative action to the contrary . . .".[45] It cannot be said that there has not been legislative action to the contrary in Delaware.

Delaware is a common law state.[46] The English common law which existed when the State came into being remains in force until changed by the Delaware General Assembly.[47] Repeal of common law rights and duties is not favored and will be strictly construed.[48] The legislature is presumed to know the common law when it has under consideration legislation for enactment into law.[49] Delaware's Premises Guest Statute "clearly reflects the legislative intent to codify the common law." [50] "(C)onsequently the repeal of a statute even though declaratory of it, revives the common law as it was before the statute." [51]

For those reasons, this Court should reject Appellants' argument that Delaware's Premises Guest Statute is an unconstitutional denial of the equal protection guarantee of the Fourteenth Amendment. To do otherwise, would merely revive [52] the same common law in Delaware.

44. *Smith v. Arbaugh's Restaurant*, *supra* at 105.

45. Id. at 102.

46. *Makin v. Mack*, Del. Ch., 336 A. 2d 230 (1975). *Fields v. Synthetic Ropes, Inc.*, Del. Super., 221 A. 2d 617 (1965).

47. *Makin v. Mack*, *supra*. *Shellhorn & Hill, Inc. v. State*, Del. Supr., 187 A. 2d 71 (1962).

48. *Cohen v. Krigstein*, Del. Super., 114 A. 2d 225 (1955).

49. *Makin v. Mack*, *supra*.

50. *Acton v. Wilmington & N. R. R. Co.*, *supra*.

51. *Makin v. Mack*, *supra* at 234. 2A Sands, Sutherland Statutory Construction (4th Ed. 1972) § 50.05.

52. *Acton v. Wilmington N. R. R. Co.*, *supra*. See also *DiSabatino Bros., Inc. v. Baio*, Del. Supr., 366 A. 2d 508, 510 (1976); *Restatement (Second) of Torts*, §§ 341, 341A, 342 (1965).

This section of the brief shows that Delaware's Premises Guest Statute is not unconstitutional and, therefore, the Court need not consider Appellants' further argument which has its basis in *Brown v. Merlo* and the diverse opinions on, and confusion over, the constitutionality of automobile guest statutes. Automobile guest statutes have a different genesis, do not arise out of the common law, and are not before the Court.

C. Rowland, Merlo and Kermarec Are Not Authority to Declare Delaware's Premises Guest Statute Unconstitutional.

Appellants cite *Rowland* [53], *Merlo* [54] and *Kermarec* [55] as their authority for having the Court declare the Delaware statute unconstitutional and, in so doing, they castigate *Silver* [56] as being outmoded for today's society.

In *Rowland*, the California Supreme Court nullified the judge-made traditional doctrine between invitees and licensees. *Merlo*, based in part on the authority of *Rowland*, declared California's Automobile Guest Statute unconstitutional. *Silver*, of course, is the early decision of this Court upholding the constitutionality of Connecticut's Automobile Guest Statute. This Court in *Kermarec* declined to adopt the common law landowner concepts of differing status as they might have been applied in an admiralty matter.[57]

53. *Rowland v. Christian*, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561, 32 A. L. R. 3d 496 (1968).

54. *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 66 A. L. R. 3d 505, 506 P. 2d 212 (1973).

55. *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625 (1959).

56. *Silver v. Silver, supra.*

57. Under the U. S. Constitution, judicial power in "all cases of admiralty and maritime jurisdiction" is given to the Federal Courts. U. S. CONST., art. 3, § 2. See also Judiciary Act of 1789; the present applicable section is 28 U. S. C. A. § 1333.

The *Rowland* Court made clear that it was dealing with judicially created common law classifications which were capable of being cast aside by subsequent judicial action when they were deemed no longer to serve any useful purpose.[58] As a matter of fact, the *Rowland* Court cited this Court's decision in *Kermarec* in abandoning the traditional common law rules.[59]

In these decisions, the California Supreme Court abandoned a common law doctrine on the authority that this Court declined to extend the application of that doctrine to a new field, and the California Supreme Court used its earlier decision as authority for declaring its Automobile Guest Statute unconstitutional, notwithstanding the fact that this Court upheld the constitutionality of a similar automobile guest statute many years before.

It has been observed [60] that *Rowland* is prima facie distinguishable in jurisdictions without statutory provisions equivalent to § 1714 [61] of the California Code, although the real basis was judicial dissatisfaction with its perceived unfair, and unworkable, common law system.

When *Rowland* obliterated the traditional distinction between invitees and licensees, only California's automobile guest was denied the standard of ordinary care by his host. The *Merlo* Court placed considerable significance on the *Rowland* abandonment and said that it was as unreasonable to single out the automobile guest as it

58. With respect to whether legislative action is necessary to change a judge-made rule of long standing, see *Anno:* 25 A. L. R. 2d at 44 (1952).

59. *Rowland v. Christian, supra* at 566.

60. 44 N. Y. U. L. Rev. 426 (1969).

61. § 1714. "Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought injury upon himself . . .".

was to lower the standard of care owed a visitor on private property. Accordingly, and notwithstanding the blatant undistributed middle, the Court held that California's Automobile Guest Statute resulted in an impermissible classification and therefore invidious discriminatory treatment.

Appellants' reasoning that the Delaware's Premises Guest Statute is unconstitutional because the Delaware Supreme Court upheld its constitutionality by analogizing it to Delaware's Automobile Guest Statute ignores the fact that Delaware has not abolished the common law, and that *Merlo* is not a decision of this Court.

Merlo may be a logical consequence so far as California is concerned in light of its *Rowland* determination to abandon the traditional tort doctrine that the status of a person determines the duty owed him by a landowner. The distinctions between invitees, business visitors, licensees, social guests and trespassers have not only been preserved in Delaware, they have been codified.[62] Accordingly, *Merlo* is not authority to strike Delaware's Premises Guest Statute by first striking down Delaware's Automobile Guest Statute. The *Merlo* Court construed a statute of the State of California.

In 1936, the Delaware Supreme Court held [63] that its Automobile Guest Statute was constitutional and that neither the Delaware nor the United States Constitutions forbade the General Assembly, either expressly or by necessary implication, from measuring the degree of care [64]

62. Admittedly, England, the homeland of the common law, has discarded these distinctions. See *Occupier Liability Act*, 1957, 5 and 6 Eliz. 2, c. 31. *The Restatement (Second) of Torts* (1965), however, still distinguishes between trespassers, licensees, gratuitous licensees and invitees. See §§ 329, et seq.

63. *Gallegher v. Davis, supra.*

64. In the earlier case of *Coleman v. Rhodes*, Del. Supr., 159 A. 649 (1932), the Delaware Supreme Court declared the pre-

to be afforded by an owner or operator of an automobile to a gratuitous passenger, and that the statute was a proper exercise of the police power of the State of Delaware.[65] *Gallegher* was reaffirmed by the Delaware Supreme Court nearly 40 years later in 1974,[66] by a specific rejection of the *Merlo* rationale.

The Court in *Gallegher* discussed the cases from other jurisdictions, including *Silver*. This Court in *Silver* held that the Connecticut Guest Statute, similar to that of Delaware, was constitutional and did not deny the guest equal protection of the laws under the Fourteenth Amendment. This Court said:

> We need not * * * elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object.[67]

D. Merlo's Mixed Reviews.

Appellants rely heavily on *Merlo*. The *Merlo* decision appeared in February 1973. In the ensuing six years, *Merlo* has played to mixed judicial reviews.

In September 1973, the Court of Civil Appeals of Texas considered [68]—and rejected—*Merlo*. Justice Guittard, speaking for a unanimous court, concluded his opinion by saying:

64. (Cont'd.)
decessor automobile guest statute unconstitutional because it prohibited the maintenance of an action by a guest under any set of circumstances.

65. Since *Gallegher*, the statute was amended by 47 *Del. Laws*, Chapter 47(a) to include boats, airplanes and other vehicles, in addition to motor vehicles.

66. *Justice v. Gatchell*, Del. Supr., 325 A. 2d 97 (1974).

67. *Silver v. Silver, supra* at p. 122.

68. *Tisko v. Harrison*, 500 S. W. 2d 565 (Tex. Civ. App. 1973).

> The equal protection clause of the Fourteenth Amendment and the "equal rights" clause of the Texas Constitution do not authorize courts to encroach on the Legislature's area by exalting their own views on the wisdom of legislation to the rank of constitutional principles or by imposing standards so rigorous as to leave no tolerance for the imperfections inherent in political processes. Courts should accept legislative classifications as valid unless invidious discrimination is clearly demonstrated.[69]

In March 1974, Justice Prager of the Supreme Court of Kansas said about *Merlo*: "We are impressed with the sound rationale of the opinion . . . ." [70] But three of his brother Justices dissented with Justice Kaul saying, in his dissenting opinion, that the Kansas Court, relying on *Merlo,* had "judicially abolished the statute rather than waiting for the Legislature to act" [71]; that he believed "the Legislature is the proper forum for determination of the issue" [72]; and that "the Act poses a question steeped with social implications . . . more appropriate for legislative solution than judicial determination." [73]

Also in March 1974, Chief Justice Callister, speaking for a unanimous Supreme Court of Utah, first referred to an annotation that identified "a viewpoint which regards tort law as a device for social engineering", [74] then went on to say: "*Brown v. Merlo,* in effect, elevated this device for social engineering to the level of a constitutional doc-

69. Id. at 573.

70. *Henry v. Bauder,* 213 Kan. 751, 518 P. 2d 362, 366 (1974).

71. Id. at 371.

72. Id. at 371-372.

73. Id.

74. *Anno:* 32 A. L. R. 3d 496, 513, n. 3 (1970).

trine".[75] Justice Crockett, concurring specially, said of *Merlo:* "It impresses me as mainly concerned with rationalizations toward a desired result of repudiating their statute".[76]

In April 1974, Chief Justice Moore of the Supreme Court of Iowa said of *Merlo:* "Its reasoning is unsound".[77]

In May 1974, the Supreme Court of North Dakota found that State's guest statute contravened the North Dakota Constitution, but declined to find the North Dakota statute unconstitutional under the Fourteenth Amendment of the Federal Constitution, saying: "To this extent we disagree with *Brown v. Merlo, supra,* which held that the California statute violated both Federal and State Constitutions." [78]

In June 1974, Justice McQuade of the Supreme Court of Idaho said: "We are persuaded that the California decision in the [Merlo] case should be followed and the guest statute declared unconstitutional." [79] But Chief Justice Shepard, in a scathing dissent, said:

> The illogic of the majority decision herein has obviously been lifted from the decisions of California and Kansas. Those decisions, parroted by the majority herein, set up two strawmen, one the collusive lawsuit, and secondly the advancement of hospitality. Then all three opinions effectively destroy the strawmen and conclude therefor that an automobile guest statute is so patently unrelated to the attainment of a

75. *Cannon v. Oviatt* (Utah), 520 P. 2d 883, 886, appeal dismissed, 419 U. S. 810, reh. denied 419 U. S. 1060 (1974).

76. Id. at 889.

77. *Keasling v. Thompson, supra* at 692.

78. *Johnson v. Hassett,* 217 N. W. 2d 771 at 780 (N. D. 1974).

79. *Thompson v. Hagan,* 96 Idaho 19, 523 P. 2d 1365, 1370 (1974).

> valid stated objective that it violates either the Federal or State Constitution relating to equal protection.[80]

Chief Justice Shepard also said: "I consider the action of the majority opinion today to be an unwarranted intrusion by the Judicial Branch of Government into the area of policy determination traditionally and historically reserved for the Legislative Branch of Government." [81]

In August 1974, the Oregon Supreme Court unanimously upheld the Oregon Automobile Guest Statute and specifically rejected the *Merlo* rationale on the ground that most of the changed circumstances upon which the California Supreme Court relied were wrought by that Court itself in discarding previously recognized common law doctrines.

Also in August 1974, Chief Justice Herrmann of the Supreme Court of the State of Delaware said:

> We share the view upholding the constitutionality of guest statutes against the force of the *Merlo* rationale * * * The balancing of intangibles, such as are involved in the *Merlo* approaches, is a proper legislative function * * * The balancing of competing advantages and disadvantages is also fundamentally a legislative function * * * The appellants, and all who share increasing disillusionment with the Automobile Guest Statute under present conditions, must address themselves to the General Assembly.[83] For this Court to abolish the guest statute because of changed conditions would, in our view, amount to impermissible judicial legislation.[84]

80. Id. at 1373.

81. Id. at 1372-1373.

82. *Duerst v. Limbocker*, 209 Or. 252, 525 P. 2d 99 (1974).

83. The majority of critics of guest statutes have advocated legislative repeal, not judicial repudiation. See e.g., *Keasling v. Thompson, supra*, at 694.

Delaware rejected *Merlo*, unanimously.

The score to date is *Merlo* 7—guest statutes 13.[85]

The *Merlo* arguments, relied upon so heavily by the Appellants in this Court, have not been persuasive in the majority of the other courts in which those arguments have been made with respect to the constitutionality of automobile guest statutes.[86] Appellants here use the *Merlo*

84. *Justice v. Gatchell, supra*, at 102-103.

85. The following guest statutes have been upheld: *Hill v. Garner*, 277 Or. 641, 561 P. 2d 1016, dismissed for want of a substantial federal question, 98 S. Ct. 623 (1977); *Neu v. Grant* (10th Cir. 1977), 548 F. 2d 281; *Sidle v. Majors*, 536 F. 2d 1156 (7th Cir. 1976), cert. denied, 429 U. S. 945 (1976); *Behrns v. Burke*, S. D., 229 N. W. 2d 86 (1975); *White v. Hughes*, 257 Ark. 627, 519 S. W. 2d 70, dismissed for want of a substantial federal question, 423 U. S. 805 (1975); *Richardson v. Hansen*, 186 Colo. 346, 527 P. 2d 536 (1974); *Cannon v. Oviatt*, 520 P. 2d 883 (Utah), dismissed for want of a substantial federal question, 419 U. S. 810, reh. denied 419 U. S. 1060 (1974); *Keasling v. Thompson*, 217 N. W. 2d 687 (Iowa 1974); *Justice v. Gatchell*, Del. Supr., 325 A. 2d 97 (1974); *Tisko v. Harrison*, 500 S. W. 2d 565 (Civ. App. Tex. 1973); *Delaney v. Badame*, 49 Ill. 2d 168, 274 N. E. 2d 353 (1971); *Beasley v. Bozeman*, Ala., 315 S. 2d 570 (1975); *Brady v. Acs*, 264 Ind. 285, 342 N. E. 2d 837 (1976); *Stoehr v. Whipple*, 405 F. Supp. 1249 (D. Neb. 1976).

The following cases have held guest statutes invalid: *McGeehan v. Bunch*, 88 N. M. 308, 540 P. 2d 238 (1975); *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 538 P. 2d 574 (1975); *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975); *Thompson v. Hagan*, 96 Idaho 19, 523 P. 2d 1365 (1974); *Henry v. Bauder*, 213 Kan. 751, 518 P. 2d 363 (1974); *Brown v. Merlo, supra; Manistee Bank and Trust Co. v. McGowan*, 394 Mich. 655, 232 N. W. 2d 636 (1975); *Johnson v. Hassett*, 217 N. W. 2d 771 (N. D. 1974).

86. The Illinois Aviation-Guest Statute has also been held to violate neither the equal protection nor due process clauses of the Federal or Illinois Constitutions. *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330, 355 N. E. 2d 683 (1976). The distinctions between the behavior of host and guest on an airplane and on land are far more marked than distinctions between behavior in an automobile and on land. See *Ker v. Messmer*, 96 Idaho 75, 524 P. 2d 536 (1974). The premises guest can leave the property upon

argument in the effort to have this Court declare unconstitutional, not Delaware's Automobile Guest Statute, but Delaware's Premises Guest Statute. That result can be obtained only if this Court is first willing to overrule its decision in *Silver* and declare the remainder of this country's automobile guest statutes unconstitutional in the face of thirteen state courts declining to do so.

In *Merlo*, the California Supreme Court purported to distinguish *Silver* on the grounds that it was decided 40 years earlier and circumstances had changed.[87] The California Supreme Court implied that this Court would overturn *Silver*, if given the opportunity.[88]

Not only was the California Supreme Court presumptuous on this point, it was incorrect. At the time the *Merlo* opinion was issued, there existed the year-old ruling of this Court in *Retza v. Fortune*,[89] in which an appeal from an Ohio decision upholding the Ohio Guest Statute was dismissed for want of a substantial Federal question. The California Supreme Court was either unaware of that ruling or chose to ignore it.[90]

In 1928, this Court upheld the Connecticut decision in *Silver*. Chief Justice Wheeler of the Connecticut Su-

86. (Cont'd.)
notice of negligence or hazardous activity. In an airplane or automobile, the host is in control whereas the landowner need not be present and cannot control all areas of the premises. See *Thompson v. Hagan, supra.* Of course, if the departure of the premises' guest is thwarted or blocked, he would then have a cause of action beyond the scope of the guest statute.

87. Delaware remained constant during the same period. *Gallegher v. Davis, supra; Justice v. Gatchell, supra.*

88. 506 P. 2d 217, n. 4.

89. 409 U. S. 810 (1972). Of course, it is recognized that three years later the Ohio Supreme Court rendered its Guest Statute unconstitutional. *Primes v. Tyler,* 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975).

90. The dismissal for want of a substantial Federal question preceded *Hicks v. Miranda,* 422 U. S. 332 (1975), by three years. See footnote 92, *infra.*

preme Court, in his dissent, found *Merlo*-type arguments persuasive and would have had the Court hold the Connecticut statute contravened the equal protection clause of the Fourteenth Amendment of the United States Constitution. Those *Merlo*-type arguments were made to this Court in *Silver* and were rejected by it. This Court upheld the constitutionality of the Connecticut statute which is almost identical to that enacted by the General Assembly of Delaware.

This Court has passed on the constitutionality of automobile guest statutes on five occasions. In 1928,[91] it ruled such statutes constitutional. In 1972,[92] 1974,[93] 1975,[94] and 1976,[95] it reaffirmed that decision by finding appeals from state court decisions upholding the constitutionality of automobile guest statutes failed to present substantial Federal questions. As the Courts in *Tisko v. Harrison*[96] and *Cannon v. Oviatt*[97] point out, both Texas and Utah retain the traditional common law tort concept that the status of a person determines the duty owed to him. Thus, the Texas and Utah statutes do not single out the automobile guest alone, and treat him differently from all other guests, as did California's.

91. *Silver v. Silver, supra.*

92. *Retza v. Fortune, supra.*

93. *Cannon v. Oviatt, supra.* The case before this Court does not present the concern expressed by Mr. Justice Brennan in the *Sidle v. Majors* dissent with respect to the interaction of *Hicks v. Miranda, supra* (holding that state and lower federal courts are bound by this Court's summary disposition of appeals), and *Cannon v. Oviatt* (appeal dismissed for want of substantial federal question) because this case only peripherally involves automobile guest statutes and is not the one in which to "give plenary consideration to the constitutional issue that has stirred such conflict among state and lower federal courts." 429 U. S. at 951.

94. *White v. Hughes,* 257 Ark. 627, 519 S. W. 2d 70 (1975), appeal dismissed, 423 U. S. 805 (1975).

95. *Sidle v. Majors,* 429 U. S. 366 (1976).

96. *Tisko v. Harrison, supra.*

97. *Cannon v. Oviatt, supra.*

Delaware, like Texas, Utah and many other states, continues to recognize the traditional common law tort doctrine that the status of a person determines the duty owed to him. Delaware continues to recognize the distinction between business visitors and licensees. Delaware continues to recognize interspousal immunity.[98]

The Delaware guest statutes do not single out the premises guest alone, and impose upon him a burden different from that imposed on other guests, as was the case in California. The Delaware Automobile Guest Statute applies to guests in boats and on airplanes, as well as in motor vehicles.[99]

The legal background against which the *Merlo* classification was measured is distinguishable from the legal background against which the Delaware statutory and common law classifications must be measured. That distinction, standing alone, shows that *Merlo* is not applicable to Delaware.[100]

98. Delaware has modified the judge-made rule of parental immunity holding that it is not applicable to the extent of a parent's liability insurance coverage. *Williams v. Williams,* Del. Supr., 369 A. 2d 669 (1976). But cf. *Strahorn v. Sears, Roebuck & Co.,* Del. Super., 123 A. 2d 107 (1956) which the *Williams* Court specifically said it did not overrule. The Delaware Supreme Court has also abandoned the judge-made doctrine of charitable immunity. *Durney v. St. Francis Hospital, Inc.,* Del. Super., 83 A. 2d 753 (1951).

99. *Justice v. Gatchell, supra.*

100. A prime reason running throughout the cases which have relied on *Merlo* and declared the automobile guest statute unconstitutional is the "advent of widespread automobile liability insurance". *Thompson v. Hagan, supra* at 1370. There is no compulsory liability insurance for homeowners as there is for automobile owners. See e.g., 21 *Del. C.* § 2902. Thus, as opposed to the rationale overruling the automobile guest statutes, without limited liability, a homeowner would have to bear directly the risk of his negligence toward guests whereas the automobile owner's risk is shifted elsewhere by mandatory insurance. Moreover, automobile travel is inherently more hazardous than mere entry into another's home or onto his premises.

Finally, after *Silver,* and until *Merlo,* there was essentially quiet in the land on the issue of the constitutionality of automobile guest statutes.[101] *Merlo* admittedly has created the furor. Some states upon reconsideration have declared their automobile guest statutes unconstitutional,[102] while others have observed constancy.[103] Notwithstanding the result in any given case across this Nation, it is clear that the issue is being reviewed as a matter of social and economic policy in the state courts and state legislatures. That is as it should be; the issue should be resolved in the States, not in the United States Supreme Court.

The States constitute 50 experimental laboratories and as this Court said in *Dandridge v. Williams,*[104] those 50 laboratories are free to experiment and are given great latitude in the realm of social, economic and political values.

The Delaware Supreme Court has upheld the constitutionality of Delaware's Automobile Guest Statute, which is not before this Court, as well as the constitutionality of the Delaware Premises Guest Statute, which is. Delaware's General Assembly, which in the latter case decided to codify the common law, is the proper forum to consider its repeal of the Premises Guest Statute if it decides that *Rowland* is the wise and sound wave of the future. This is as it should be in the United States.

101. Most critics address their desire for repeal to the legislatures, not to the courts. See footnote 83.

102. For example, Ohio's statute was held constitutional in *Retza v. Fortune, supra,* in 1972 but declared unconstitutional by the Ohio Supreme Court in *Primes v. Tyler, supra,* in 1975.

103. Delaware, for example, upheld its statute in 1936 in *Gallegher v. Davis, supra,* and reaffirmed that decision nearly 40 years later in *Justice v. Gatchell, supra.*

104. *Dandridge v. Williams, supra.*

CONCLUSION.

This appeal should be dismissed or the decision below affirmed because the question on which the decision depends does not present a substantial Federal question.

Respectfully submitted,

MASON E. TURNER, JR.,
ROBERT G. CAREY,
PRICKETT, SANDERS, JONES,
ELLIOTT & KRISTOL,
1310 King Street,
P. O. Box 1328,
Wilmington, Delaware. 19899
Attorneys for Appellee.

DATED: December 31, 1979.

PROOF OF SERVICE.

AND NOW, TO-WIT, this 31st day of December, A. D. 1979, I hereby certify that all parties required to be served have been served copies of Appellee's Motion to Dismiss or Affirm for Want of a Substantial Federal Question, and the accompanying brief in support of the motion, that service has been made on Appellant pursuant to Rule 33(1) by mailing three copies, by depositing them at the United States Post Office at Wilmington, Delaware, first class postage prepaid, on December 31, 1979, to Appellants' counsel of record: Harold Schmittinger, Esquire, P. O. Box 427, Dover, Delaware 19901.

PRICKETT, SANDERS, JONES,
ELLIOTT & KRISTOL
By: MASON E. TURNER, JR.,
1310 King Street,
Box 1328,
Wilmington, Delaware 19899.